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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 25

BENJAMIN McNABB, FREEMAN McNABB, AND
RAYMOND McNABB, PETITIONERS

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1942
CERTIORARI GRANTED JUNE 8, 1942

SUPREME COURT OF THE UNITED STATES

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1 In the United States District Court for the Eastern District of Tennessee, Southern Division, Chattanooga, Tennessee

No. 89—Murder

UNITED STATES OF AMERICA

vs.

BENJAMIN McNABB, FREEMAN McNABB, AND RAYMOND McNABB

1-A

Bill of exceptions

Filed Feb. 20, 1941

Testimony of SILAS E. ANDERSON

(The jury herein retired at the request of the defense for purposes of introducing any statements that any of the defendants might have made as to that particular hat.)

Cross-examination by E. B. BAKER, Esq., of Defense Counsel:

While the jury was still excluded the witness testified further:

The first statement I heard Barney McNabb make about the hat was at the cemetery on the first day of August. The hat was lying on the ground about the center of the cemetery and someone asked Barney if he knew whose hat it was and he stated that he did not. He was at the cemetery at that time and the next statement he made, that I heard, he stated that the hat was his; and that was in Room 57 in this Building on the morning of August 3rd in the presence of the four defendants; they had already been asked about the hat in the presence of each other; they were all questioned about the hat; Barney said the hat was his and he was being questioned by Mr. Taylor. I do not know how long he had been questioning him and I hadn't heard of any threats made. I know he hadn't been mistreated in my presence and he hadn't been promised anything in my presence. I was in and out and I don't know how long *long* he had been in charge; I would go out and come back and I do not know how long he had been in there before he said that was his hat, but he had been questioned more than once. I do not know how long he had been in the office being questioned before he made that statement, and the first time I saw him was in the office on the 2nd and was examined there on the 3rd. To the best of my judgment he was there from the second until the third, but

he did not stay there continuously; he was there, again on the night 2nd and held until the morning of the 3rd, that is when he admitted this was his hat. I did say that he was there until midnight on the 2nd and when he was not being questioned he was carried back to jail. I do not know when he was brought back, but he was there just after midnight on the 3rd and to the best of my judgment between one and two o'clock. I do not know whether or not he was arrested, but he was in custody when I first saw him on the first day of August in the morning. He was taken back to the cemetery to the scene of the crime and brought back in where they carried him to jail; I don't know when they brought him back here but he was in Room 57 in my judgment as late as 2 o'clock in the morning of the 3rd, and they were not kept here; they were all taken back to the jail at near 2 o'clock. That is the last time I saw him, about two o'clock on the morning of the 3rd of August, and that is when he made this statement, or somewhere near that time; it might have been one o'clock. I didn't say they had been in the office there all day and most of the night and I don't know what time they were brought down here and I don't know when was the first time I saw him before midnight of the 2nd, but I did see him at 12 o'clock on the night of the 2nd, but I don't know who brought him back there or how long he had been there and I wouldn't say whether or not he was in the office there as early as 6 o'clock, or 7 o'clock, or 8 o'clock, or 9 o'clock, or 10 o'clock. I don't know; but as near as I can place him I did see him at 12 o'clock and again at 2 o'clock on the morning of the 3rd. He was not questioned continuously in relays by the officers all that time, but different ones at intervals, and we questioned these defendants one at a time and separately, too. I didn't question any of them myself. I just heard it. I did not have a warrant for Barney McNabb's arrest at that time and I do not serve warrants, but he was in custody and I don't know whether a complaint had been taken for him or not and I would like to make this statement, some of these defendants were brought into the office several minutes before I heard Barney make a statement about the hat. I would not be positive just what defendants they were not all in the office on the 2nd or 3rd. I wouldn't say positively which ones were brought out and which were not. Upon being questioned by the Court the witness replied. I heard no threats or promises whatever, and there were no forces used nor any lights used on them. They had good seats; some of them were carried out to get sandwiches, they bought sodas and treated them as nicely as anybody.

Cross-examination by OTTO AULT, Esq.:

I did not at any time make any threat or use any force on these defendants, nor did I at any time promise them anything, and I didn't hear anybody else. I don't know whether the other officers did or not, I know they did not in my presence.

The question was here taken up between the Attorney for the Government, the defense Attorney, and the Court as to hearing the evidence in regard to admission of certain statements made by the defendants and to the exclusion of the jury.

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RE-CROSS-EXAMINATION

Questions by E. B. BAKER, Esq.:

R. X Q. 1. You came to Room Number 57 on the morning of the 1st of August.

A. Yes, sir.

R. X Q. 2. Raymond McNabb was at that time in custody in Room 57?

A. I don't know about that.

R. X Q. 3. Do you know whether he had been arrested?

A. I had heard that he was, but I don't know.

R. X Q. 4. Raymond McNabb is the one I am talking about?

A. I had heard he had been arrested.

R. X Q. 5. I will ask you if you don't know that he was put in the bull pen about 2 o'clock that morning, and kept there all night and the next day?

A. No, sir; I don't know that.

R. X Q. 6. Did you see him in there on the day of Aug. 1st?

A. No, sir.

R. X Q. 7. Did you see him anywhere on the 1st?

A. I don't recall it.

R. X Q. 8. When did you first see him?

A. I wouldn't be positive, but it was not on the 1st. I think it was on the 2nd.

R. X Q. 9. What time on the 2nd, did you see him?

A. I don't know.

R. X Q. 10. Where did you see him?

A. In Room 57 or Room 58.

R. X Q. 11. What time of the day was that?

A. I don't know.

R. X Q. 12. Do you know where he had been before that?

A. No, sir; I do not.

R. X Q. 13. Who was present in the room when you saw him?

A. I don't know.

R. X Q. 14. Any other officers there?

5 A. I am sure there was, but I don't recall.

R. X Q. 15. Did anybody question Raymond?

A. They did, but I don't know—

R. X Q. 16. When did they question him then?

A. I don't know.

R. X Q. 17. Do you know which one is Raymond, as you know which one?

A. Yes, sir; I do; the second over there from the left [indicating].

R. X Q. 18. This one here [indicating]?

A. Yes, sir.

R. X Q. 19. You don't know the time of day; you don't know who was present when he was being questioned?

A. No, sir. He was questioned on the 2nd.

R. X Q. 20. How do you know he was?

A. I was there when he was being questioned.

R. X Q. 21. What time of the day were you in there when he was being questioned?

A. I don't know.

R. X Q. 22. Who was doing the questioning?

A. Mr. Taylor or Mr. Beman.

R. X Q. 23. What time of the day was that?

A. I don't know.

R. X Q. 24. Sometime in the afternoon?

A. I don't know. I was in and out, and I wouldn't say.

R. X Q. 25. You don't know how long he stayed there?

A. No, sir.

R. X Q. 26. You don't know how long Mr. Taylor or Mr. Beman questioned him?

A. No, sir.

R. X Q. 27. You saw him again on the 2nd, before midnight?

A. I saw him on the 2nd; I wouldn't say what time.

R. X Q. 28. It was at night?

A. I saw him in the daytime.

R. X Q. 29. You saw him at what time?

A. I don't recall.

R. X Q. 30. Was it about 2 o'clock in the morning?

A. That was on the 3rd.

R. X Q. 31. When he made some sort of statement?

A. Yes, sir.

R. X Q. 32. He had been in the officer and questioned continuously all day on the 2nd and all night up until 2 o'clock on the 3rd?

A. No, sir.

R. X Q. 33. Were you in there all the time?

A. No, sir.

R. X. Q. 34. You don't know how long he had been questioned?

A. No, sir.

R. X. Q. 35. How long were you present when he was questioned?

A. I couldn't state that; I don't know.

R. X. Q. 36. As much as five minutes?

A. Longer than that.

R. X. Q. 37. As much as 4 hours?

A. I was in the office on the 2nd from about 7 o'clock until the 3rd about 2 or 3 o'clock. He was not in there all that time.

R. X. Q. 38. Do you know whether he was somewhere else in this building?

A. No, sir; he had been taken back to the jail.

R. X. Q. 39. How do you know?

A. I know somebody carried him to the jail and went back and got him.

R. X. Q. 40. Do you know what time they went back and got him?

A. No, sir.

R. X. Q. 41. Did you see anyone bring him back?

A. I was in the office when he came in.

R. X. Q. 42. Did you see them take him away?

A. Yes, sir.

R. X. Q. 43. You saw them leave the building?

A. I saw them leave the office.

R. X. Q. 44. Do you know whether they went to the jail?

A. No, sir; I couldn't say.

R. X. Q. 45. And it was about 2 o'clock in the morning before he made a statement of any kind?

A. I wouldn't say 2 o'clock, between 12:00 o'clock and 2 o'clock.

R. X. Q. 46. That was on the 3rd of August?

A. Yes, sir; that he made a statement in the presence of Benjamin and Freeman McNabb.

Mr. BAKER. We want to call Mr. Taylor.

By COURT. They say he is not here.

Mr. BAKER. That is what we were talking about. Are any of the others here?

By COURT. You gentlemen could have had him subpoenaed here.

By Mr. BAKER:

R. X. Q. 47. Can you give me the name of any other officer present at the time these defendants were being questioned. Raymond McNabb in particular.

A. No, sir; I could not.

R. X. Q. 48. Do you know of any other officer.

A. I wouldn't be positive who was in there at the time.

R. X. Q. 49. Was Mr. Beman there?

A. I am not sure; he could have been.

R. X. Q. 50. Was Mr. Burke?

A. I don't know that.

R. X. Q. 51. Mr. Jakes?

A. I don't know.

R. X. Q. 52. Was Mr. Kitts?

A. I don't know.

R. X. Q. 53. Was Mr. Levy there?

A. I don't know.

R. X. Q. 54. Was Mr. McKinney?

A. I don't know.

R. X. Q. 55. Was Mr. Renick?

A. I don't know. They were in and out. Some were in there, but I don't know which ones.

8. R. X. Q. 56. Was Mr. Sullivan or Mr. Lallinger?

A. I don't know.

R. X. Q. 57. Was Mr. Ricketts there?

A. I don't think so. Some of those men were there, but I don't know which ones were there.

Mr. BAKER. Call R. A. Beman.

9. (The jury is still retired from open court upon examination of the following witnesses:)

The witness, R. A. BEMAN, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

Q. 1. Are you connected with the Alcohol Tax Unit?

A. Yes, sir.

Q. 2. What is your position?

A. Assistant Supervisor.

Q. 3. Did you question Raymond McNabb in reference to this case?

A. Yes, sir.

Q. 4. When did you question him?

A. On the 1st and 2nd of August.

Q. 5. On the 1st of August and the 2nd of August?

A. Yes, sir.

Q. 6. Where did you question him?

A. In the office of the Alcohol Tax Unit at Chattanooga.

Q. 7. In Room Number 574

A. Yes, sir; and Number 58.

Q. 8. When did you first question him on the 1st?

A. It was in the afternoon.

Q. 9. Where did you question him?

A. In the room I spoke of here.

Q. 10. Did you send anywhere to get him?

A. I don't know that I did. He was in the custody of the Marshal.

Q. 11. That was on the afternoon of the 1st?

A. Yes, sir.

Q. 12. How long did you question him?

A. I don't recall. I talked to him for probably half an hour.

Q. 13. Who was with him when you got him?

A. Well—

10 Q. 14. What did you do with him, when you got through?

A. I turned him over to the Marshal.

Q. 15. Where did he take him?

A. I don't know.

Q. 16. When did you next question him?

A. On the following day.

Q. 17. On the 2nd of August?

A. Yes, sir.

Q. 18. What time of the day was it?

A. At different times during the day.

Q. 19. How many times during the day?

A. I don't recall exactly, probably three times.

Q. 20. How long did you talk to him on those occasions?

A. We would talk to one and then to another, probably 15 or 20 minutes or half an hour at a time.

Q. 21. Where was he during the day of the 2nd, was he in the Marshal's office, or where?

A. Part of the time in the custody of the Marshal, and part of the time in the office.

Q. 22. He remained in this building all the time?

A. Yes, sir.

Q. 23. When you called him back from the jail on the 2nd, did you have him sent back?

A. I don't recall; it was in the evening.

Q. 24. When did you send back after him?

A. Late at night.

Q. 25. 9 or 10 o'clock at night?

A. Yes, sir.

Q. 26. Was he brought back to Room 574?

A. Yes, sir.

Q. 27. How long was he kept there then?

A. Until after midnight.

Q. 28. Three or four o'clock in the morning?

A. No.

Q. 29. As late as 2 o'clock?

11 A. Between 1 and 2 o'clock.

Q. 30. Was he questioned from 10 o'clock to 2 o'clock?

A. No, sir.

Q. 31. How many different men did you have there questioning Raymond McNabb concerning this case?

A. There were a number of officers taking part in the investigation, Mr. Taylor, Mr. Palmare, Mr. Kitts, Mr. Bevans, Mr. Burke, and some of the men stationed here, Mr. Jones and others.

Q. 32. Do you know how many times various other agents or investigators questioned this defendant?

A. I was present about all the time that he was questioned.

Q. 33. At all times any of the others were questioning them?

A. Yes, sir.

Q. 34. Were they all five present in Room 57 from 9 or 10 o'clock on the night of the 2nd, until about 2 o'clock on the morning of the 3rd?

A. They were not altogether; they were down there. There are three rooms there.

Q. 35. All present in the building?

A. Yes, sir.

Q. 36. Were they questioned separately?

A. Questioned separately and then all together.

CROSS-EXAMINATION

Questions by OTTO AULT, Esq.:

X. Q. 1. Did you hear any of these other officers at any time ever offer any immunity or any reward for the testimony of these defendants?

A. No, sir.

X. Q. 2. Did you ever offer any inducement, or any intimidation, either bodily abuse or mental abuse to get them to make any statement?

A. No, sir.

X. Q. 3. Were their constitutional rights explained to them, if they didn't want to make any statement?

12 A. Yes, sir; fully.

X. Q. 4. Were these statements made voluntarily on their part?

A. Yes, sir.

X. Q. 5. Did they offer to make any statement to you?

A. They did make voluntary statements.

REDIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

R. D. Q. 1. You say they volunteered to make statements?

A. Yes, sir.

R. D. Q. 2. That was about 2 o'clock on the morning of the 3rd?

A. No, sir.

R. D. Q. 3. Did they volunteer to make a statement before that?

A. They came into the office for the purpose of making a statement, and the first thing they did they said they were anxious to make a statement.

R. D. Q. 4. You say they came into the office, the officers had gone to the jail, they were in bed asleep, they sent for them?

A. That is at the last. I am talking now about the beginning.

R. D. Q. 5. They wanted to make a statement at the beginning?

A. They did.

R. D. Q. 6. You agents did not get it until 2 o'clock on the morning of August 3rd?

A. That is not correct.

R. D. Q. 7. That is when you did take it?

A. No, sir; at other times; during that time.

R. D. Q. 8. Why did you continue to ask them?

A. There were certain discrepancies in their stories, and we were anxious to straighten them out, and the best way to do it was to get all five of them together; they all having stated they were anxious to tell the truth about it. That was the reason for bringing them down the last time.

R. D. Q. 9. Couldn't you have waited until the next morning to get them straightened out, was it necessary to straighten them out at 2 o'clock in the morning?

13 A. They were all finished before 2 o'clock.

R. D. Q. 10. You got all the discrepancies straightened out?

A. That is correct.

R. D. Q. 11. Between 10 o'clock and 2 o'clock in the morning?

A. Somewhere during that time.

R. D. Q. 12. Was anybody told they were yellow, or called a damned liar?

A. Nobody that I know of.

R. D. Q. 13. Did you hear anybody called a damned liar?

A. Not a damned liar.

R. D. Q. 14. Anybody tell them they were liars?

A. They admitted they were.

R. D. Q. 15. Did any of the officers tell them they were a liar?

A. Yes, sir; they did.

R. D. Q. 16. How many times?

A. I did not keep track of that.

R. D. Q. 17. Many times or few times?

R. D. Q. 18. When they got a statement you didn't right,
you would tell them they were a liar?

A. No; I didn't.

R. D. Q. 19. You said you did?

A. They were told that they were lying.

R. D. Q. 20. Particularly Barney McNabb?

A. When they would make a statement we did not think was true, they would be told it was not true, not necessarily that it was a lie.

R. D. Q. 21. You told them repeatedly from 10 o'clock on that night until 2 o'clock the next morning?

A. No, sir.

R. D. Q. 22. Until nearly 2 o'clock?

A. No, sir. These statements were all taken before that time. We had interviewed all the men before 10 o'clock on the night of the 2nd.

R. D. Q. 23. Did you hear anybody threaten to knock one of them out of his chair because he was lying?

A. No, sir; I don't know about that.

14 R. D. Q. 24. That could have happened?

A. I didn't do it myself.

R. D. Q. 25. You were there all the time, you said?

A. In and out; yes.

R. D. Q. 26. Then you were not there all the time, you don't know what other officers told these men, or anyone of them?

A. These men were not under constant questioning. I was present when they made their statements, except E-mail.

R. D. Q. 27. You had taken statements, and checked over from 10 o'clock at night, and finally got a statement that was satisfactory according to what you thought the truth was. That was after you sent for these defendants and brought them back down to your office?

A. We sent for the defendants and they were brought back for further questioning.

R. D. Q. 28. You repeatedly told them they were not telling the truth, until they made the statement that was satisfactory to you?

A. No, sir.

R. D. Q. 29. Did you finally get a statement that was satisfactory to you?

A. We got the statements as they gave them.

R. D. Q. 30. You finally got one that was satisfactory?

Mr. AULT. We object to that.

RE-CROSS-EXAMINATION

Questions by OTTO AULT, Esq.:

R. X. Q. 1. With reference to the question that was asked you about the statements, that they were lying or not telling the truth, I will ask you if these defendants at different times didn't themselves say that was a lie?

A. Yes, sir; repeatedly.

R. X. Q. 2. You agreed that it was, and then they would make another statement?

A. Yes, sir; they would say "that is all a lie, and now I will tell you the truth."

R. X. Q. 3. You state they would say that?

A. Yes, sir.

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REDIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

R. D. Q. 1. What prompted them to say that?

A. I don't know their minds; I am not attempting to read them.

R. D. Q. 2. You told them, or other officers told them, what they had said was a lie?

A. No, sir.

RE-CROSS-EXAMINATION

Questions by OTTO AULT, Esq.:

R. X. Q. 1. Who was doing the questioning?

A. Mr. Taylor did most of it, except the statement of Barney McNabb and Emul McNabb; Capt. Larkins took those.

REDIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

R. D. Q. 1. Neither Mr. Larkins or Mr. Taylor are here?

A. Mr. Larkins is here.

Witness excused.

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The witness, CLAUDE RICKETTS, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

Q. 1. What time did you get to the Federal Building on the morning of Aug. 1st?

A. It was before daylight.

Q. 2. Who did you find in custody when you got here?

A. Three of the McNabb boys.

Q. 3. Emuil, Raymond, and Barney?

A. It was not Barney, it was the other three?

Q. 4. Emuil, Raymond, and Freeman?

A. Yes, sir.

Q. 5. Where were they when you got here?

A. In that little lock-up.

Q. 6. Do you know how long they had been there?

A. No, sir.

Q. 7. You don't know whether they had been there all night, or not?

A. I have no idea.

Q. 8. That was before daylight?

A. Yes, sir.

Q. 9. On the morning of the first?

A. Yes, sir.

Q. 10. How long did they stay in this little room on the 1st day of August?

A. I cannot answer that.

Q. 11. Did you take them to the Hamilton County jail?

A. Not at that time; no.

Q. 12. Did anybody else have the right to take them, except you; any other officer?

A. I cannot answer that.

Q. 13. You, yourself, did not take them?

A. No.

17 Q. 14. Did you have occasion to go to the jail and get any of these prisoners and bring them back down here on the 2nd or 3rd?

A. No, sir.

Q. 15. Do you know what time these three defendants left the Federal Building and went to the Hamilton County jail?

A. Sometime in the afternoon.

Q. 16. Late in the afternoon?

A. Around 4 o'clock I guess.

Q. 17. Do you know who took them?

A. I took one to the jail that afternoon.

Q. 18. That is what I am asking you, what time you took them to the jail?

A. Around 4 o'clock.

Q. 19. They had been in this little room continuously from the time you saw them that morning?

A. I cannot say that; I think they were downstairs some.

Q. 20. They were in this building somewhere?

A. Yes, sir.

Q. 21. Do you know whether they had anything to eat during that time?

A. Yes, sir; they had sandwiches.

Q. 22. Who gave them to the defendants?

A. Some of the Alcohol Unit men.

Q. 23. Did you see that?

A. Yes, sir.

Q. 24. Did you see these three defendants get something to eat?

A. Yes, sir.

Q. 25. Emul, Raymond, and Freeman?

A. Yes, sir.

Q. 26. Do you know what agent gave them food?

A. No, sir.

Q. 27. You didn't go back to the jail on the night of the 2nd and bring them back?

A. No, sir.

18 Q. 28. Do you know how they got down here, or how they got back to the jail?

A. I do not.

Q. 29. Is there any bed in this little room next to the Marshals' office?

A. No, sir.

Q. 30. Any chairs in there?

A. No, sir.

Q. 31. Any stool?

A. No, sir.

Q. 32. Nothing in there that you can sit down on or lie down on, except the floor?

A. No, sir.

CROSS-EXAMINATION

Questions by OTTO AULT, Esq.:

Mr. AULT. We have no questions.

Witness excused.

19 The witness, R. T. KITTS, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

Q. 1. Are you R. T. Kitts?

A. Yes, sir.

Q. 2. Are you connected with the Alcohol Tax Unit?

A. Yes, sir.

Q. 3. Did you take part in questioning any of these defendants?

A. I did.

Q. 4. Which ones?

A. I think practically all of them.

Q. 5. When did you first see Freeman McNabb?

A. On the first of August.

Q. 6. When did you first see Raymond McNabb?

A. On the first of August.

Q. 7. When did you see Emul McNabb?

A. The 1st day of August.

Q. 8. Where were they when you saw them?

A. In the office of the Alcohol Tax Unit.

Q. 9. What time of the day was it?

A. It was the night of Aug. 1st—in the afternoon, around 8 o'clock, as I remember it.

Q. 10. Around 7 o'clock on Aug. 1st?

A. The three that you named. I believe Barney was there, too.

Q. 11. Did you talk to them then?

A. Yes, sir.

Q. 12. How long did you talk to them?

A. I don't remember.

Q. 13. What time in the night did you get through talking to them?

A. I don't remember that.

Q. 14. Was it late at night, or early?

A. Around 10 o'clock, as I remember that was on the 1st.

20 Q. 15. You got there with them about 10 o'clock?

A. 9 or 10 o'clock; I am not positive.

Q. 16. It could have been later?

A. I don't think later than 10 o'clock.

Q. 17. Had someone else been questioning them that afternoon, before you talked to them, or do you know?

A. No; I don't know.

Q. 18. Were they all here in the Federal Building at 7 o'clock when you questioned them?

A. That is the way I remember it, those three. We went to Jasper and got Barner out of the jail and Benjamin came in on the morning of the 2nd.

Q. 19. When you first started talking to them around 7 o'clock, they were in the building, someone was there already questioning these three men, was there not, somebody talking to them when you came in?

A. No.

Q. 20. Were they there with the other agents?

A. As well as I remember, they were brought down from the jail.

Q. 21. You talked to them about three hours?

A. No; I didn't.

Q. 22. They were there in the office about three hours?

A. I don't know.

Q. 23. They got down there about 7 o'clock and were there until after 10?

A. If that is when they came down and were taken back, that would be true.

Q. 24. Did anybody try to see them while you had them down there?

A. No.

Q. 25. Did any relatives ask for the privilege of seeing them?

A. No.

Q. 26. Did you call any of these defendants a liar in the course of your questioning them?

A. No, sir.

21 Q. 27. You didn't tell any of them that he was not telling the truth?

A. I did not call him a liar.

Q. 28. What did you call them?

A. Well, we taken their statements there; we tried to get the truth out of them.

Q. 29. When they told something you didn't think was true you reminded them that it was not true?

A. I might have told them that couldn't be true.

Q. 30. You told them it couldn't be true, no use to tell you that?

A. Possibly so. I don't remember the exact words, but I did not call any of them a liar.

Q. 31. When you got another statement, you didn't tell them it was not the truth; that you knew it was not true?

A. I don't remember the exact words.

Q. 32. You did that time after time over a period of hours on August 2nd didn't you?

A. I questioned longer on August 2nd then on the 1st, especially Benjamin and Barney.

Q. 33. Now, did you talk to them any time on the morning of the 2nd of August?

A. In the afternoon, I believe it was.

Q. 34. You started talking to them in the afternoon?

A. Yes, sir.

Q. 35. What time in the afternoon?

A. I don't remember the exact time.

Q. 36. Was it the middle of the afternoon?

A. As I remember, around 3 o'clock; because we went back to the cemetery in the morning.

Q. 37. You took them down there on the morning of the 2nd, is that right?

A. No; I didn't. I took Barney down there.

Q. 38. The afternoon of the 2nd a bunch of other officer' had them in the room questioning them from around 3 o'clock on.

22 A. I don't remember the time.

Q. 39. You said it was sometime about the middle of the afternoon.

A. Yes, sir.

Q. 40. How long did you talk to them?

A. I don't remember.

Q. 41. Did you take them back to jail for supper?

A. No; we bought them some sandwiches and coco colas, several times, and cigarettes.

Q. 42. On the afternoon of the 2nd, you took them back to jail, after they had been brought down about the middle of the afternoon?

A. I don't believe I went with them, but they were taken to jail.

Q. 43. When?

A. Late in the evening.

Q. 44. You or others on the afternoon of the 2nd, some of the officers, reminded them they hadn't told the truth every once in a while; that they had not told the truth?

A. Yes, sir.

Q. 45. Some of their relatives asked to be permitted to see them and you wouldn't let them?

A. I did not.

Q. 46. Yet you were not satisfied and sent back to the jail and got them out of bed about 10 o'clock at night, on the night of the 2nd?

A. They were back that night of the 2nd; I believe about 10 o'clock.

Q. 47. They didn't come down there by themselves, voluntarily.

A. No; they were in jail.

Q. 48. They didn't call you up and tell you they wanted to come down and talk?

A. They were confined in jail.

Q. 49. You sent and got them out about 10 o'clock and kept them there until about 2 o'clock in the morning of the 3rd, didn't you?

23 A. We kept them until after midnight; I don't remember when.

Q. 50. Did you finally persuade what you thought the truth was?

A. They made a statement.

Q. 51. They finally made a statement, and those statements were acceptable to you, and you took them back to jail about 2 o'clock in the morning?

A. They swore to that; part of them did; not all of them.

Q. 52. Did you question them any more after that practically all night session on the 3rd?

A. It was not an all-night session. I didn't question them any more. I don't know whether anybody else did or not.

Q. 53. You did continuously, or you officers did, told them they were not telling the truth, or what you insisted was the truth?

A. No, sir.

Q. 54. And they would make some statement, you would tell them that it was not true?

A. Possibly so.

Q. 55. You had previously decided what was the truth?

A. (Witness does not answer.)

Q. 56. That is right?

A. I did not make all of the decisions.

Q. 57. When they finally made a statement satisfactory to you, you took them back and let them go to bed?

A. I didn't take them back.

Q. 58. You sent them back; you or some other officer?

A. (Witness does not answer.)

Q. 59. Did you tell Raymond McNabb you would knock him out of the chair with a book if he didn't stop lying to you?

A. No, sir.

Q. 60. Did you wave a book in his face?

A. No, sir.

Q. 61. How many of you officers were there from 10 o'clock until 2 o'clock in the morning with these 4 or 5 boys talking to them and asking them questions?

A. I couldn't be positive of that.

24 Q. 62. How many were there?

A. At least six.

Q. 63. These boys had no lawyer there, had no relatives there, had no friends there, is that right?

A. Well, they didn't have any enemies there.

Q. 64. Nobody except some nice people trying to persuade them they were not telling the truth?

Mr. AULT. We object to that.

A. They were instructed to tell the truth.

By COURT. The Court is hearing this testimony, no jury here.

A. I want to make this statement, they were told all the time to tell the truth and nothing but the truth, that all we wanted was the truth.

Mr. BAKER:

Q. 65. But the truth was what you thought it ought to be and not what they thought, was it not?

A. We knew what the truth was.

Q. 66. You wanted them to agree that what you finally got was correct?

A. (Witness does not answer.)

Q. 67. Is that right?

A. No.

Q. 68. You officers were all pretty sore because another officer had been killed, and you were prejudiced in the matter?

A. I was not sore.

Q. 69. You didn't feel good about it?

A. Naturally, I did not.

Q. 70. You wanted the man disposed of who did it?

A. I wanted justice to be meted out to the man who did it.

Q. 71. Did these boys have anything to eat between 10 o'clock and 2 o'clock?

A. Yes, sir; they were treated with every courtesy; we insisted that they eat.

Q. 72. Did any of them get sick from eating too much?

A. I don't know.

25 By COURT. That may be pertinent, but the Court cannot see it.

Witness excused.

The witness, JAMES T. JAKES, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

Q. 1. Mr. Jakes, you are with the Alcohol Tax Unit?

A. Yes, sir.

Q. 2. Where are you stationed?

A. At Knoxville, Tennessee.

Q. 3. Did you take any part in questioning any of these defendants?

A. I was in and out of the room at times, but I didn't do any questioning.

Q. 4. On what occasion did you hear anyone questioning the McNabb boys?

A. I couldn't say; I think it was the night of Aug. 1st.

Q. 5. What time in the night was it?

A. Well, the first part of the night, on the first occasion, possibly 6 or 7 o'clock.

Q. 6. That was here in this building?

A. Yes, sir.

Q. 7. Who was being questioned at that time; which one?

A. I don't know. They brought the defendants in one at a time, several times, I don't know which one was brought in first, or anything about that.

Q. 8. Where did you find them when they were brought in?

A. They were brought from the county jail.

Q. 9. What time did they start bringing them down?

A. It was in the afternoon of August 1st.

Q. 10. What time in the afternoon?

26 A. I couldn't say when they first started bringing them down.

Q. 11. Was it along about the middle of the afternoon?

A. Possibly; yes, sir.

Q. 12. When did you take them back?

A. They would be brought in, be questioned possibly at various times, some of them half an hour or maybe an hour, or maybe 2 hours.

Q. 13. You didn't take them back and forth to the county jail each time, did you?

A. Yes, sir.

Q. 14. What time did the defendants go back to the county jail on the night of August 1st?

A. It was late at night.

Q. 15. About 12 o'clock?

A. That is probably right; somewhere around that hour.

Q. 16. You had brought them down about 3 o'clock in the afternoon?

A. Not all at the same time; various ones at different times during the day and night.

Q. 17. In other words, the officers had been questioning them all of that day from about 3 o'clock in the afternoon, until about 12 o'clock that night?

A. Yes, sir.

Q. 18. You don't know which ones they were working on at any particular time?

A. No, sir.

Q. 19. Was it later than 12 o'clock that they took the last one back?

A. I doubt that; but it was around midnight.

Q. 20. When you first saw them on the morning of the 2nd?

A. The best I recall, somewhere around 10 or 11 o'clock in the morning.

Q. 21. Did you bring these defendants back then?

A. Not at the same time. I was not the only one who brought them down, other officers would get them and take them back. I did not bring them every time.

Q. 22. You were taking them back and forth from about 10 o'clock on the 2nd of August?

A. Yes, sir.

Q. 23. You brought them down here in the morning, and the afternoon, and at night?

A. As I recall, they were questioned during the day.

Q. 24. Questioned continuously from 10 o'clock?

A. No, sir; not continuously.

Q. 25. Well, off and on all day?

A. They stopped for lunch, and every now and then would have coca colas brought in and rest a while.

Q. 26. Did they have to have rest?

A. We would get hamburgers, and eat them.

Q. 27. You had to have rest?

A. We had to have something to drink.

Q. 28. You and the other officers had to have rest?

A. Apparently.

Q. 29. You got very tired?

A. Yes, sir.

Q. 30. You got very tired about 12 or 1 o'clock on the morning of the 3rd of August, didn't you?

A. To the best of my recollection I don't think they were questioned on the 3rd. That was Saturday morning. I think they were questioned until somewhere around midnight, to the best of my recollection.

Q. 31. It ended on the 2nd?

A. That is my recollection.

Q. 32. Was it not a fact that it was after 1:30 or around 2 o'clock when you finally got through?

A. It could have been, but to the best of my recollection it was around midnight.

Q. 33. The officers were very tired?

28 A. I didn't say we were tired.

Q. 34. You officers did get very tired.

A. No, sir; I wouldn't say that.

Q. 35. You had to stop to rest?

A. We stopped for refreshments; yes, sir.

Q. 36. Where were you at 9 o'clock on the morning of the 1st, when you took no part in questioning them, I believe you say?

A. No, sir.

Q. 37. What time on the 1st did you come into the case?

A. Somewhere around 8 o'clock on the morning of the 1st. I arrived a little late on account of a matter that does not concern this case.

Q. 28. You were an outside man bringing them back and forth?

A. I was on the job.

Q. 39. I will ask you if some of the defendants' family, wives, mothers, fathers, didn't come and ask to see them and you turned them away?

A. No one asked to see them; they didn't ask me.

Q. 40. You did see some of them around the entrance to the room?

A. The only party I remember seeing was the mother of Benjamin, she was around the building somewhere; I don't remember where I saw her. She didn't talk to me as I remember, right now.

Witness excused.

29 The witness, R. E. BURKE, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

Q. 1. Is this R. E. Burke?

A. Yes, sir.

Q. 2. Are you connected with the Alcohol Tax Unit?

A. I am.

Q. 3. When did you first arrive to start work on this particular case?

A. On August 1st, about 8 o'clock.

Q. 4. Where did you report to?

A. To the Chattanooga office here.

Q. 5. Who did you contact?

A. Eventually, Capt. Beman.

Q. 6. Did you see any of these defendants shortly after you got there?

A. No, sir; no shortly.

Q. 7. When was the first time you saw any of them?

A. The first I saw any of them was on the evening of Aug. 1st.

Q. 8. Where were they then?

A. At the Federal Building.

Q. 9. Were they being examined then by various officers?

A. They were.

Q. 10. What time of the day did you see them?

A. In the evening, around 6 P. M.

Q. 11. Did you participate or help in the examination?

A. I made notes of it; I didn't ask questions.

Q. 12. Who was doing the questioning?

A. Mr. Taylor.

Q. 13. How long did he question these various defendants the afternoon and night of August 1st?

A. I am not sure about the time.

Q. 14. Approximately how late at night did you get through?

20 A. I believe it was around 11 o'clock.

Q. 15. Various defendants had been examined continuously or intermittently from about 6 to 11 the night of the first?

A. Yes, sir; different defendants at different times.

Q. 16. Did you hear anybody, when they made a statement not satisfactory to Mr. Taylor, did you hear him remind them it was not true?

A. The defendants were informed by Mr. Taylor that we were in possession of the true facts; yes, sir.

Q. 17. When they made a statement that did not correspond to what Mr. Taylor knew to be the true facts, he would remind them that their statement was not true?

A. He did.

Q. 18. He continued to remind them of that until 11 o'clock that night, and then sent them back to jail?

A. They were taken back to the county jail after questioning.

Q. 19. When were they brought back the next morning?

A. I don't remember the exact time, it must have been after 9 o'clock.

Q. 20. Between 9 and 10 o'clock.

A. Yes, sir.

Q. 21. How long were they kept there on the morning of the 2nd, being questioned?

A. As I remember, they were not all brought at one time, and not all returned at the same time. They were questioning them all during the morning.

Q. 22. And during the afternoon?

A. Some during the afternoon.

Q. 23. Did you take them back to jail on the evening of the 2nd, around supper time?

A. I didn't.

Q. 24. Were they taken back?

A. I believe so; yes, sir.

Q. 25. What time on the night of the 2nd were they brought back?

31 A. At various times, brought back at different times. I went after some of them around 9 or 10 o'clock.

Q. 26. At night?

A. Yes, sir.

Q. 27. You woke them up; got them up out of bed?

A. I don't believe they were in bed; I didn't see them in bed.

Q. 28. You just took them to the jail and brought them back?

A. That is right.

Q. 29. You talked to them until about 2 o'clock on the morning of the 3rd, did you not?

A. I don't know. It was late.

Q. 30. Considerably after midnight?

A. Yes; I believe it was.

Q. 31. Probably around 2 or 3 o'clock in the morning?

A. It could have been.

Q. 32. By that time Mr. Taylor had convinced these boys that the true facts were as he knew them all the time?

A. Yes, the boys told the truth.

Q. 33. About 2 o'clock on the morning of August 3rd, was anybody present, any friend, any lawyer, any advisor present when any of these five men were being questioned, except Federal Officers?

A. There were relatives of these boys in an adjoining room. I don't believe the boys asked for anybody to come; I don't believe there is anybody in there except officers.

Q. 34. Do you know whoever was in charge refused to let any of these defendants' relatives come in while they were being questioned?

A. No, sir; I don't know that.

Q. 35. At one time didn't you, yourself, when Emuil McNabb started to reach over and take his baby out of his wife's arms, didn't you compel him to sit down or go on?

A. No, sir.

Q. 36. You didn't do that?

A. No, sir.

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CROSS-EXAMINATION

Questions By OTTO AULT, Esq.:

X Q. 1 Did you ever at any time offer any of them any reward?

A. No, sir.

X Q. 2. Did you ever hear any other officer do that?

A. No, sir.

X Q. 3. Did you see any indignity offered to any of these defendants?

A. No, sir; I did not.

(Witness, excused.)

33 The witness, JERALD P. LEVY, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

Questions by E. B. BAKER, Esq.:

Q. 1. Are you connected with the Alcohol Tax Unit?

A. Yes, sir.

Q. 2. Were you so connected back in August and July of this year?

A. Yes, sir.

Q. 3. When were you first directed to take any part in this particular case?

A. Mr. McKinney, Investigator in Charge, called me at my residence about 2:00 o'clock on the morning of August 1st.

Q. 4. Where did you go then?

A. I went down to the office of the Alcohol Tax Unit.

Q. 5. What did you find when you got there?

A. I think Mr. McKinney was there, and Mr. Abrams.

Q. 6. Had any of the defendants been taken into custody at that time?

A. No, sir.

Q. 7. How long before you first saw any of them?

A. I saw the first defendant, Barney McNabb, early in the morning, after daylight, at the Marion County jail.

Q. 8. You went and got him?

A. Yes, sir.

Q. 9. You brought him back here?

A. Yes, sir.

Q. 10. Were you present when any of these defendants were examined?

A. Yes, sir; I was.

Q. 11. When was the first time you were present when the examination was going on?

A. The morning after I brought Barney in.

34 Q. 12. That was on the second of August?

A. That was the first of August.

Q. 13. The first of August was the day after the shooting happened?

A. Yes, sir; we brought Barney in to the county jail on that morning.

Q. 14. How long had you been here with him?

A. I don't know exactly.

Q. 15. Who was doing the examining?

A. Mr. Katts.

Q. 16. Do you know how long he examined Barney McNabb?

A. I would say definitely, no, sir.

Q. 17. Was it an hour or two?

A. I wouldn't say more than that; maybe thirty or forty minutes.

Q. 18. Were you present when any of the other McNabb boys were examined?

A. I believe I was during part of the time when they were talking to Benjamin.

Q. 19. Were you present when Emul, Raymond, and Freeman were examined?

A. I was in and out. I didn't hear much that they said. Some of the time I didn't know who they were examining.

Q. 20. You were in and out?

A. Yes, sir.

Q. 21. Did you hear Mr. Taylor and others examine these defendants during the day of the 1st of August?

A. Yes, sir; I believe I did; I don't remember which one it was.

Q. 22. Did they examine them on the night of the 1st?

A. No, sir; I was not present at any night session at all.

Q. 23. You were not present at the night session on the 2nd and 3rd of August?

35 A. No, sir.

Q. 24. Did you hear Mr. Taylor tell any of these defendants they were lying?

A. No, sir; I did not hear that statement at all.

CROSS-EXAMINATION

Questions by OTTO AULT, Esq.:

Mr. AULT. No questions.

(Witness excused.)

36 The witness, SAM MCKINNEY, having first been duly sworn, testified as follows:

Direct Examination by E. B. BAKER, Esq., of Defense Counsel:

I questioned Raymond and Barney McNabb, part of the time, on the morning of August 2nd. Benjamin McNabb voluntarily came into the office of the Alcohol Tax Unit and stated he wanted to make an explanation of his whereabouts on the day before. I am not sure whether I questioned Raymond or not, I heard him questioned by other officers some of the time, but I was not there all the time. I was not present at the night session of August

2nd and 3rd, but I was present in the morning of August 1st about 10 or 11 o'clock at which time we talked to one or the other of them the greater part of the day up and into the night. I didn't see them anywhere except in the office and we did not talk to them continuously, but often at different times. I did not tell them they were not telling the truth and I did hear Mr. Taylor tell them they were not telling the truth on one or more occasions. I never heard Mr. Taylor tell the defendants that if they would tell the truth it would be easier on them. I asked them to tell the truth and nothing but the truth. I have never told Barney McNabb it would be lighter on him if he told the truth or harder on him if he didn't tell the truth. There was no one in the room with Barney and Benjamin during this questioning except Alcohol Tax men.

Cross-examination by ORTO AULT, Esq.:

Benjamin McNabb came to the Alcohol Tax Office voluntarily sometime before noon on the morning of August 2nd and said that he wanted to make an explanation of his whereabouts, and his statement was written down. Later he was confronted with the statements made by the other boys, in which the other boys had accused Benjamin of firing both shots. Benjamin thereupon said, "If they are going to accuse me of that, I will tell the whole truth, you may get your pencil and paper and write it down." I did not offer them any immunity or reward for making this statement, nor did I offer them any kind of abuse, nor did anyone else while I was present.

Redirect examination by WILKES T. THRASHER, Esq., of Defense Counsel:

I think Mr. Taylor, Mr. Beman, possibly Mr. Larkin and Mr. Burke were present when Benjamin McNabb made his statement. There were no lawyers or anyone else with him except alcohol tax men.

The witness, Mrs. ARCH McNABB, having first been duly sworn, testified as follows:

Direct examination by J. M. C. TOWNSEND, Esq., of Defense Counsel:

I am Mrs. Arch McNabb and I am the mother of these boys—Raymond, Emuill, and Freeman, who were brought over here between one and two o'clock in the morning on August 1st. Between 9 and 10 o'clock that same morning I tried to visit the boys, first at the jail and then in the basement at the Federal Building where the boys were being questioned. No one would

let me see them and the man who had them ordered me out of the room. One of my daughters, my husband, and Mr. Pinkerton were with me.

39 The witness, HERMAN PINKERTON, having first been duly sworn, testified as follows:

Direct examination by J. M. TOWNSEND, Esq., of Defense Counsel:

I think the office of the Alcohol Tax Unit is down stairs in this basement. I know all the defendants and Mrs. Arch McNabb, mother of Freeman, Raymond, and Emul McNabb. I came to this building on the morning of August 1st with Mrs. Arch McNabb when she tried to visit her sons. We first went to the jail and Chief Brown told us they were down here and we came down here. I believe I knocked on the door, anyway we went in and an officer told us that we could not talk to them until later on. That was all there was to it.

40 The witness, Mrs. ——— McNABB, having first been duly sworn, testified as follows:

Direct examination by WILKES T. THRASHER, Esq., of Defense Counsel:

I am Mrs. McNabb and on August 1st I learned the Government wanted my son so the next morning I brought him in to the basement of this building. I think to the office of the Alcohol Tax Unit where I met some officers who came out there and ordered him in. At first they let me in, but I didn't hear them talk to him to amount to anything. They ask me if he had bullet holes or shots in him. They wouldn't let me stay in there, they asked me to get out and I wasn't there when they questioned him.

Cross-examination by OTTO AULT, Esq.:

My husband was with me on the occasion and they made us stay in an adjoining room where we stayed until they took him back to jail.

Redirect examination by WILKES T. THRASHER, Esq.:

My husband and Lawrence and Jim Massengale were with me.

Re-cross-examination by OTTO AULT, Esq.:

I did not see my boy off and on during the day after they put me out until they took him to jail. I stayed there about five hours; it might have been longer than that; I wouldn't say exactly.

41 The witness, EMUL McNABB, having first been duly sworn, testified as follows:

Direct examination by J. M. C. TOWNSEND, Esq., of Defense Counsel:

I was arrested about one o'clock in the night on the morning of August 1st and put in a pen up here along with my brothers, Raymond and Freeman. We arrived at the Federal Building about three o'clock in the evening, and we stayed there all day. I was not questioned until five o'clock on the night of August 1st and when they took us from the office up to the jail. From the pen they took us to the Alcohol Tax Unit office where I was kept three or four hours, until somewhere around nine or nine-thirty at night. I don't remember who talked with me during that time. The officers threatened and called me a "wise hill-billie mountain son-of-a-bitch," this was on the night of August 2nd. They didn't call me anything the first night, but on the second night they said I had talked to some damn lawyer and that was the reason I didn't talk, but said I was trying to make a damn fool out of wise people and then about 9:30 they took me back to jail. About 11 o'clock at night on the 2nd they woke all five of us up and brought us back down to the Federal Building and kept us until about 4 in the morning. They didn't ever question us any more after this. The first time we were brought down here at 5 o'clock and kept until 9:30, we didn't have anything to drink, nor no water to drink and they wouldn't let us send out after any. I don't know any of these men personally, but I might know them if I saw them. They never threatened to strike me nor I never heard them threaten to strike any of the others. They just called me a damn liar a good many times. I do not know Mr. Taylor, but I know Mr. Levy when I see him. I think Mr. Beman told me I was
42 nothing but a "wise hill-billie son-of-a-bitch, trying to make a fool out of educated people like them." They never told me at any time they were questioning me that I was entitled to have a lawyer, nor that anything that I said might be used against me. They did tell me that if I told the truth it would be lighter on me. They did not say they would help me nor anything about making bond, but Mr. Jones asked me if I was under parole, that if I was they might put me in the electric chair. I didn't tell them I was up there. I have lived in that settlement over there all my life, I went to school at Kelley's Ferry as far as the second grade. I am twenty-two years old and the furthest I have been away from home is Stevenson, Alabama. I don't know how far that is but I expect about two hundred miles.

Cross-examination by OTTO AULI, Esq.:

Mr. Beiman talked pretty rough to me, called me a wise hill-bill's son-of-a-bitch and said they might put me in the electric chair.

43 The witness, FREEMAN McNABB, having first been duly sworn, testified as follows:

Direct examination by J. M. C. TOWNSEND, Esq., of Defense Counsel:

I am Freeman McNabb and 25 years old. I am one of the defendants and I was arrested about 1 o'clock in the morning on the 1st of August. They brought me here and put me in a cage in the Marshall's office about 2:30 or 3 in the morning where I stayed until late that evening when they took me down to the basement and questioned us and then took us to jail, where I stayed about an hour and then they brought me back and Mr. Taylor and some other man talked to us until about 11 o'clock that night when they took me back to the jail. They brought me back two or three times, some in the afternoon and some at night. On August 2nd I was brought back about 7 o'clock and kept until long after midnight when they took me back to jail. The next night they brought all of us together at about 11 o'clock at night. They came to the jail and woke us up and kept us until three or three-thirty in the morning. On the 1st day they kept us in a cage and didn't give us anything to eat or drink. The second time they brought us down at 5 o'clock and kept us until 11. We didn't have anything to eat; Emul wanted to send out and get something to eat and they wouldn't let him. During this time they threatened to slap me on one occasion and one officer said I was crazy and yellow and was a big pile of manure in my neighborhood. I reckon he told me that because he said I was lying. He called me a liar a great number of times, I never counted how many, nearly every time I said anything he would say it was a damn lie. No one ever read a warrant to me and I don't know when it was sworn out, I don't know whether there was a warrant for me when they questioned me from 5 till eleven, nor when they questioned me from 11 till two in the morning.

No one ever told me there was a warrant issued for me,
44 and no one ever told me I could have a lawyer nor that the statements I made might be used against me. They told me if I would tell the truth they would make it lighter on me and let me make bond. Mr. Taylor seemed to be in charge of my questioning, although there were five or six others around there. However, none of my family was present, nor none of my friends. I lived in the community 25 years and went through the 4th grade

at school at Kelley's Ferry. The furthest I have ever been from home is to Jasper, which is about twenty-one miles. One time they threatened to knock me out of my chair with their fist and Mr. Taylor was present and never said anything, but they didn't hurt me.

Cross-examination by OTTO AULT, Esq.:

Neither of the men who have been on the witness stand threatened to knock me out of my chair, he was a curly-headed man, but I don't know who he was. Mr. Taylor repeatedly told me that I was a damned liar. No one ever offered us anything to eat; no one offered us coffee, coca colas, or anything. We offered to buy something and they wouldn't let us. When I tried to tell them anything they would say it wasn't right and I was never warned of my rights nor never told that I could make a statement or not make it. I have been in court once before, but I didn't have to make any statement; I just plead guilty; this time they said I had to make one.

Redirect examination by J. M. C. TOWNSEND, Esq.:

When I plead guilty it was for manufacturing whisky. Mr. Wilkes, Thrasher represented me at that time.

45 The witness, BARNEY McNABB, having first been duly sworn, testified as follows:

Direct examination by J. M. C. TOWNSEND, Esq., of Defense Counsel:

I am Barney McNabb, one of the defendants. I found on the morning of August 1st at 5 o'clock that I was wanted by the authorities. Mrs. Arch McNabb and my wife told me about it. I went over to Jasper and later I was brought to this building by the Federal authorities at about 9 or 10 o'clock, where I was taken downstairs somewhere where there were seven or eight men. The only two of them I knew were Mr. Kitts and Mr. Levy; I didn't see Mr. Taylor that morning. They questioned me about two hours that morning and then took me out to the cemetery, then they brought me back and questioned me some more for an hour, then they took me to the county jail and didn't bring me back any more that day. About 8 or 9 o'clock the next morning they brought me down here and kept me until noon and then took me back to the jail where they left me until the next day, the third morning. On August 2nd I was brought down about 8 o'clock, and on the night of August 2nd about 8 or 9 o'clock, and they came to the jail and got me and kept me until 10 or 11 o'clock before I was taken back. The last time they brought me

down they came to the jail about 11 o'clock at night and got me and kept me until two or three o'clock in the morning. On the first morning Mr. Kitts told me that if I didn't tell the truth he would burn me up, but if I did tell the truth he would make it

46 lighter on me; they told me that several times. Mr. Taylor hit me over the head with a book one time and Freeman was sitting right beside me when he did. He did that when he called me a liar and I said I was not and he said he knew I was. Before he hit me he called me a son-of-a-bitch and said I was yellow and he told an officer to take me back to the jail and let me stay there until I rotted because he knew I hadn't told the truth.

I am 28 years old and have lived in the McNabb settlement 28 years. I have been as far as Jasper once or twice and went to the third grade in school.

Cross-examination by OTTO AULT, Esq.:

Mr. Ament arrested me in front of Jim McNabb's place on the highway and carried me to the Marion County Jail where Mr. Ricketts, Mr. Levy, and Mr. Kitts came and got me. They brought me to a room in the basement of this building and then they took me back out to the cemetery. I didn't volunteer to go, they just took me. They handcuffed me and kept me handcuffed all the time. I didn't tell them nothing; Mr. Kitts told me he would burn me up on the morning of the first, that was the first time they talked to me, and that if I told the truth he would make it light on me. He told me this several times. Mr. Taylor called me a son-of-a-bitch and hit me with a book, something like lying on your desk, he had it rolled up. It hurt alright but, of course, I couldn't have done anything about it if he killed me. They didn't arrest me; I just surrendered out on the road of Jim McNabb's house because I had word they wanted me and just came out there.

Redirect examination by J. M. C. TOWNSEND, Esq.:

I spent the night at Chester McNabb's house across the river, he told me that Mr. Ament was waiting for me over at Jim McNabb's and I found him there and went with him.

47 The witness, RAYMOND McNABB, having first been duly sworn, testified as follows:

Direct examination by J. M. C. TOWNSEND, Esq.:

I am Raymond McNabb, twin brother of Freeman McNabb, and I was taken into custody by Federal Officers on the 31st of July at one or two o'clock in the morning, that was really the first of August because it was after midnight. I am twenty-five

years old, having lived in the McNabb settlement twenty-five years and went to the fourth grade in school. The farthest I have ever been away from home is around Jasper. I was brought here and put in that detention room on the morning of August 1st at about 2 o'clock and kept there until five o'clock that afternoon and during that time I did not have anything to eat. No one questioned me that day but I was taken down to the basement and finger-printed. I didn't make an effort to get anything to eat but my brother did; he tried to get them to get something for all of us to eat. He asked an officer and the officer said we couldn't have anything. After I was finger-printed I was taken to the jail where I was kept until eleven o'clock at night and where I had a cheese sandwich to eat. That same night about 10 or 11 o'clock I was brought back down here and kept until between two or three and during that time five or six men questioned me. Mr. Taylor told me he would knock me out of my chair if I didn't tell the truth and that he knew what the truth was and that everything I had told him was a lie. He told me that if I told the truth I could get bond and he would make it light on me. He called me a liar several times, pretty often as a matter of fact, and said I was just telling a God-damn lie. He didn't call me any names however or hit me with anything, but he had a book which he swung around my face pretty often.

There was no one there with me except the federal officers.

48 Cross-examination by J. B. FRAZIER, Esq., District Attorney:

I have never been any further away from home than Jasper, Tennessee, but I have been in Chattanooga a good many times and that is as far as I have ever been away from home. I was in Federal Court in January of 1938 when I entered a plea of guilty. The best I remember Mr. Taylor was big fat chunky man and I was never warned of my constitutional rights. None of the defendants were with me and I never made any statement and I don't know anything about what my brother was going to swear to. I don't know who the man was who threatened me except he was a Government man. I don't know whether I have ever seen him around Court or not, nor do I know whether I would know him if I should see him. My brother asked him could he send out and get something to eat and the man said that wasn't allowed. On the first day I was finger-printed in the afternoon and then taken to jail where I received a cheese sandwich and was questioned the first time that night about 10 or 11 o'clock. I was then taken back to jail about two or three o'clock the next morning.

Redirect examination by J. M. C. TOWNSEND, Esq.:

I had a cousin by the name of Raymond McNabb over in that community but he is now dead, it is about twenty-one miles from my home to Jasper and twelve miles to Chattanooga.

49 BENJAMIN McNABB, having first been duly sworn, testified as follows:

Direct examination by WILKES T. THRASHER, Esq., of Defense Counsel:

I am Benjamin McNabb, one of the defendants, and I am twenty years old. I have lived in the McNabb community all my life, went to the fourth grade in school, and have never been arrested before in my life. I was arrested on August 2nd, when I came to this courthouse after I received word they wanted me. I first talked to the Government man on August 2nd in the basement of this building when they questioned me for about five or six hours. I didn't have a lawyer with me, a friend, or a relative, and they never told me that I was entitled to a lawyer; neither did they tell me that what I said would be used against me. They cursed me and told me I was telling a God-damn lie. I don't know who the man was, but there wasn't anyone there except Government men, and they made me take my clothes off because they wanted to look at me. This scared me pretty much. They also told me that they knew what the truth was, and I wasn't telling it, and that if I told the truth they would make it lighter on me, but if I didn't they would burn me up in the electric chair. The farthest I have been from home is Jasper, Tennessee, and to Chattanooga, which is closer than Jasper. They brought me back that night about eleven o'clock and took me back to the jail about two o'clock in the morning.

Cross-examination by J. B. FRAZIER, Esq.:

My mother and father came with me on August 2nd and stayed in another room. I didn't tell the officer that I wanted to make a statement but merely told them that I came in because I heard they wanted me, had been looking for me, and told my mother to have me come in. When I first came in I sat with my mother and father ten or fifteen minutes and then was taken into another room, where the officer cursed me.

50 However, I don't know which ones did, and I was scared. I don't know which one said he would burn me up and have me hung. I was scared so bad I didn't know what to do. No one ever took me across the street to get me something to eat. They did stop in a restaurant on the way to jail, and I had something to eat and played a pin-ball machine. This was some time about

three o'clock, and I was not handcuffed. This was on the second day after I came in when they took me to jail and then brought me back the same night.

51 The witness, R. S. ARRAMS, recalled by counsel for defendants, and upon further examination, testified:

Re-cross-examination by E. B. BAKER, Esq.:

I filed complaints against these defendants, I don't know why the names of Emuill McNabb and Barney were written in with Ben. I don't think it was on the complaint when it was first taken out, but was added some time later. The complaint was taken out in the afternoon of August 2nd.

52 The witness, H. B. TAYLOR, having first been duly sworn, testified as follows:

Direct examination by J. B. FRAZIER, Esq.:

I am H. B. Taylor, District Supervisor, Alcohol Tax Unit, Bureau of Internal Revenue, with Headquarters in Louisville, Kentucky. On July 31 I received a call to come to Chattanooga and investigate the death of Mr. Leeper, a member of the Alcohol Tax Unit. I left Louisville about midnight and arrived here in the early morning of August 1st when I questioned four of the defendants and talked to one of them a few minutes. I talked to Barney McNabb first at the scene of where this occurred on the morning of August 1st. That evening after dinner I started questioning them at around 9 o'clock. I told each of them before they were questioned that we were Government Officers, what we were investigating, and advised them they did not have to make a statement, that they need not fear force, and that any statement made by them would be used against them and that they need not answer any questions asked unless they desired to do so, and I asked each of them if they understood that. I talked to each of them individually and each of them said they so understood. I told them that if they did answer the question to tell the truth, but that they had a right to refuse to answer if they wished. After they understood what I had told them I then proceeded with the questioning. I never called any of the defendants a damn liar, I did tell one or two of them they were lying to me. I told Freeman that he was, he told me first that he went to bed at 2 o'clock in the afternoon, on a hot day and slept until the next morning. I let him tell his entire story, that was his story, that he went to bed at 2 o'clock in the
53 in the afternoon and did not get up until the next morning when he was arrested. He said if any shot gun shots had been fired he did not hear a single shot. That was so un-

reasonable I told him that he was lying and he later said that he was. Several times when I was present during the questioning, when he was placed with his brother and cousin he would admit he lied about a particular point and would change his story but I didn't call any of them a damn liar. I never did anything to intimidate any one of them during the questioning. I did not hit anybody with anything. I have never threatened or abused any defendant in my life and I have been in the law enforcement work fifteen years. I never called any of them a smart-hill-billieson-of-a-bitch nor a manure pile. I do recall that in talking with Barney I said that any man or group of men who would hide in the dark and shoot another man, Government officer or any other person, with a shot gun was yellow. I told them on several occasions that they were not telling the truth because their confessions did not fit with the physical facts, and statements of their own crowd and we would put two of them together they could not reconcile their differences. They were brought down from the jail several times, how many I don't know. They were questioned one at a time, as we would finish one he would be sent back and we would try to reconcile the facts they told, connect up the statements they made, and then we would get two of them together. I think at one time we probably had all five together trying to reconcile their statements. This was along the last of the questioning and at this time they discussed the whole affair among themselves. I don't recall any requests by any of their people to see them, and I don't know that any of them were in the room or where they were. I know that on several occasions we sent out and got sandwiches and coca-cola and on one or more occasions I sent them across the street with an officer to buy what they wanted and I know that Captain Beman did the same thing.

Cross-examination by E. B. BAKER, Esq.:

I have been with the Alcohol Tax Unit since 1929 and have been District Supervisor for two years and assistant for four years and have been in executive capacity for six years. I have been dealing with various types of crime since 1929. On the morning of August 1st when I arrived in Chattanooga and went to the cemetery and made an examination at the scene of the killing. That this was about 9 o'clock in the morning and I stayed out there about two hours and got a picture of the scene of the crime. I questioned Barney that morning at the cemetery and again that night about 9 o'clock in the Post Office Building. I sent to the jail for them and didn't know whether they were asleep or not, but it is not unusual to get defendants out of bed when you are trying to solve a crime as quickly as you can and if we can get them at night we do so. We are interested in getting the truth

about it while it can be gotten. I probably could have gotten the truth later but it seems to me a man knows more about what he did immediately afterward and will be more apt to tell the truth about it than at any other time. None of the defendants had an opportunity to talk with their families or to a lawyer. The reason we questioned the defendants at night was because we wanted to know as much about the case as possible before questioning them and it was sometime before we got to them. They were questioned until about 1 o'clock in the morning and then sent back to the jail

as far as I know. I am sure we offered them something to
55 eat that night because I had not slept for two nights, and was hungry myself and every time we sent out for something we offered it to them. I am sure they did eat some sandwiches and it is absolutely untrue that we officers sat around eating sandwiches and did not offer them any. I don't recall whether they ate or not, I wasn't interested in that particularly, they could have if they wanted to and we told them on different occasions that if they wanted anything they could send for it. I had them back down the next day, probably about nine or nine-thirty.

We had them back and forth most of the day. I questioned four of them separately practically all day. On the night of the second we had them all for a short time all together not over an hour. We had Freeman McNabb on the night of the second for about three and one-half hours. I don't remember the time but I remember him particularly because he certainly was hard to get anything out of. He would admit he lied before and then tell it all over again. I knew some of the things about the whole truth and it took about three and one-half hours before he would say it was the truth, and I finally got him to tell a story which he said was true and which certainly fit better with the physical facts and circumstances than any other story he had told. It took me three and one-half hours to get a story that was satisfactory or that I believed was nearer the truth than when we started. When I knew the truth I told the defendants what I knew. I never called them damn liars, but I did say they were lying to me. I had Benjamin McNabb take his clothes off to see if there were any
56 kind of marks on him. We only had him take them off one time. I think that was on the morning of the second and he only had them off about two minutes. There were two or three officers besides myself at the time and there were no marks on him. I didn't have the other boys take their clothes off at all. I did not walk around him nor parade him around. I had him turn around with his back toward us as we couldn't see both sides at once. I didn't tell Barney McNabb that anyone would shoot a man under those circumstances was a yellow son-of-a-

bitch. I did tell him that any person or group of persons who would hide and shoot an officer or any other person with a shot gun was yellow. I did not have a book in my hand at any time, but I did have carbon copies of sworn typewritten notes and I had my personal notes. It would be impossible to tell all the motions I made with my hands during the two days of questioning, however, I didn't threaten anyone. None of the officers were prejudice towards these defendants nor bitter toward them. We were only trying to find out who killed our fellow officer. At no time during the questioning was any of their family there and they had no counsel present.

Cross-examination by WILKES T. THRASHER, Esq.:

I questioned Loomis Montgomery and some other man, I don't recall his name besides the McNabb boys. I questioned nearly everybody in the McNabb section, men and women, everybody I thought I might get information from. I talked to at least twenty people, some of whom were at the Federal Building. I also questioned Louis Davidson and at least one or more men named McNabb, one of whom was Lawrence McNabb.

57 Redirect examination by J. B. FRAZIER, Esq.:

I was present during nearly all the questioning. I did practically all the questioning except Freeman and Raymond. I talked with Barney out at the cemetery in an informal way. I advised him of his statutory rights and told him to some extent what others had said, and I asked him if he wanted to make a statement about it, and he said that he did. I turned him over to Captain Beman, and he questioned him. I talked to Emaul about three minutes, but I don't think I asked him a single question, Captain Larkins or someone else questioned him. The reason for having Benjamin take his clothes off was because I was informed that he had gotten an injury running through the woods or that he had been hit by a stray shot. We didn't know whether or not this was true, and asked him to take his clothes off in order to examine him and find out. During the time I was present neither I nor any other officer told them they would be electrocuted, burned, or hung if they wouldn't tell the truth, or that if they did tell the truth we would make it lighter on them.

Re-cross-examination by E. B. BAKER, Esq.:

Except Emaul I do not know what promises or statements were made by other officers because I was not there all the time.

Re-cross examination by WILKES T. THRASHER, Esq.:

I do not know whether Benjamin's mother and father were in the next room or not, they were there when we brought them in.

He did not send after Benjamin and did not see him when he first came in, and I don't know how he came. There were two rooms and a number of people came in and out of the other room; his mother and father could have been there. I would not have known them.

58 The witness, CAPT. LARKINS, having first been duly sworn, testified as follows:

Ruling re admissibility of evidence

By COURT. Gentlemen, I think I have heard enough of this; it is taking up a lot of time. I think I have a fair picture of the situation.

Mr. FRAZIER. Our only reason for putting on these witnesses—

By COURT. The Court thinks there has been enough evidence introduced, and I feel this way about it: of course, it is the duty of officers to protect the rights of defendants, and it is also their duty to protect the rights of society, to do the best they can in trying to balance the rights of both society and the defendants. I don't see anything in this case that I could, particularly disapprove except the fact these boys were put in this detention room without any seats, or without any beds, and left there for some time, but I cannot see that within itself would effect their free will, or any statement they might have made. It is held that the mere questioning of a person charged with crime does not render his statements incompetent, and that has been held to be true, even though the questioning might be somewhere rough, or that the defendant might be precluded from seeing counsel, and that is true even though their families might be kept away; I do not see that would effect the character of their statements. In this case, from the way I see the proof, there was no questioning that would show the will of these defendants was entirely overreached. It is true that they are boys, live in the country, have not been far away from home, but it is also true that they are not entirely ignorant of the affairs of life, they have lived close to a main highway, lots of people travel, lots of people stopping along there; they

59 have been in Chattanooga, and they are not so ignorant as some people might think. I think these boys had sense enough to know their rights, and I think the proof shows they were advised of their rights.

Mr. TOWNSEND. What would Your Honor think was the reaction of these midnight sessions?

By COURT. I don't think there was any physical discomfort, it only lasted two days, I don't think that there would effect their free will. There are several elements to be considered, one

is the personal element of the officer making the investigation; they are men engaged in the enforcement of the law, and have to deal with this character of crime, their line of duty does not demand that they high-pressure anybody. I appreciate the fact they would be somewhat aggitated by the killing of a fellow officer, but I don't think from the weight of this testimony that the agents overreached themselves, or imposed upon these defendants. I have read the case handed to me, I have read it before, and the opinion by Justice Black in a recent Supreme Court advanced sheet I had, but I think that case is quite different from this case. In that case there was considerable proof of high-pressure methods upon some colored men, but in this case I cannot see there has been any high-pressure brought on these defendants, which would override their will. I do not think they were promised immunity or reward. I cannot see any of that in this case. This is a question as to the admissibility of evidence.

MR. TOWNSEND. I want to submit this, your Honor, this is a question of law for the Court to decide.

By COURT. That is right.

60 MR. TOWNSEND. The, otherwise, it is question of fact for the jury.

By COURT. I cannot see this is a question of fact for the jury, but is a question for the Court to determine as to the admissibility of the evidence. Whether or not it is admissible is for the Court to say, and the Court is of opinion that it is admissible.

MR. BAKER. We except to the Court's ruling, for all of the defendants.

By COURT. It is my judgment that any statements made by any of these defendants, under the conditions as submitted to the Court, are admissible in evidence. You can save your objections as you go along, you may note your general exceptions now.

MR. BAKER. All of the defendants take their exceptions now.

By COURT. Let the jury come in.

(Thereupon, at this point the jury returned to open Court.)

No. 8900

BENJAMIN McNABB ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern
District of Tennessee

Opinion

Filed December 6, 1941

Before ALLEN, HAMILTON, and MARTIN, Circuit Judges

MARTIN, Circuit Judge: Another tragic chapter has been written in the bloody book of an age-old history of resistance by lawless mountain clans to enforcement of the Internal Revenue Laws of the United States. From the family burying ground of the Clan McNabb, a death dealing shot was fired in the dark upon a Federal Alcohol Tax Unit Investigator, while in the performance of his official duty.

Five McNabbs were indicted on the charge of murdering the officer. Freeman and Raymond McNabb, twin brothers, and their cousin, Benjamin McNabb, were convicted of murder in the second degree, were sentenced to forty-five years' penal servitude, and have appealed. The other two McNabbs, Emul and Barney, were acquitted on directed verdicts with the approval of the Government attorney.

The killing occurred in Marion County, in a mountainous section of eastern Tennessee known as the McNabb Settlement, long inhabited by that family:

The murdered Federal Officer, Samuel Leeper, had accompanied, in an automobile, three fellow officers in the Internal Revenue Service on a raid, guided by two informers by whom arrangements had been made to purchase some seventy-five gallons

62 of untaxpaid whiskey from members of the McNabb family.

The four Revenue Officers met the two informers at an appointed place on July 31, 1940, around 8:35 or nine o'clock P. M., drove with them in a separate automobile, and parked their car about one-half mile from the spot where the whiskey was to be delivered. Thence, they rode toward the McNabb Settlement in an automobile driven by one of the informers, who was accom-

panied by the other. While driving up the "McNabb Road," they saw some persons ahead, whereupon informer Davidson cut off the lights of the automobile and the officers alighted from the car. The two informers then proceeded to drive down the road to a point where they found Benjamin, Freeman, Raymond, Emul, and Barney McNabb awaiting them.

The arrangements made between the informers and the McNabbs had been to have the whiskey delivered at a barn; but, when the informers arrived, they were told that the whiskey was cached near a gate to the family cemetery. All five of the defendants were identified as present to participate in the delivery of the illicit liquor.

The car was driven into a hog lot and turned around near the edge of the cemetery. Three of the McNabbs and one of the informers were engaged in carrying the whiskey in five-gallon cans to the car when, by prearranged signal to the officers, informer Davidson flashed a flashlight on the front wheel of the automobile. The four Revenue Officers started forthwith on a run toward the car. One of the officers exclaimed, "All right, boys. Federal Officers!"

The three convicted McNabbs ran into the cemetery; the two acquitted McNabbs also made their escape. As the Federal Officers closed in, the informers drove the automobile past them and departed as previously planned.

The officers ran to the cemetery gate. Having failed to apprehend any of the McNabbs, three of the officers, including Leeper, proceeded to empty the five-gallon whiskey cans found there. One of the officers left to bring their automobile. While the remaining officers were emptying the whiskey, a rock was thrown toward them.

Officers Renick and Abrams stood waiting for the cans to drain. Officer Leeper climbed over the cemetery fence and, with lighted flashlight in hand, was pouring out the contents of two cans of whiskey found within the cemetery when he was fatally shot by the discharge from a shotgun. Apparently, the gun was fired from behind an oak tree near the center of the cemetery. Though peppered with gun shot, Leeper drew his pistol and commenced firing.

One of the officers, Renick, ran to the aid of his stricken comrade. "Where did he go, Sam?" he asked. "Behind that big rock!" Leeper replied. Renick fired two shots.

"About three minutes after the first shotgun was fired," Renick narrated at the trial, "there was a second shotgun shot and I was struck by four or five pellets or shots in different places of my face and body, and the shots apparently came from a different

direction. At the time of the second shot, I realized that my flashlight would make a good target and I turned it off and walked back to where Abrams was and I said, 'maybe they will get you too.'"

Leeper passed away a few minutes after Renick was shot. Officer Jones, who had gone for the automobile, returned to the scene and, when informed of the situation, went to the nearby house of Jim McNabb and brought back with him a boy, Lawrence McNabb, who assisted the officers in placing the decedent's body in the automobile. The only other McNabb who appeared was a woman who said she was the wife of Barney McNabb. Pursuant to the request of Officer Jones, who rejoined them some twenty minutes after the shooting, the two informers summoned an ambulance, to which the dead body was transferred near the Marion County line and carried into Chattanooga.

Freeman, Raymond, and Emul McNabb were arrested on the night of the murder, brought into Chattanooga and placed in the bull pen in the office of the United States Marshall around two o'clock in the morning. Barney McNabb was arrested the following morning, and Benjamin McNabb, accompanied by his mother and father, surrendered himself to arrest on August 2nd, saying that his mother had been told by the officers that they wanted him to come in.

After their incarceration, the five defendants, some times together, at other times separately or in groups, were repeatedly questioned concerning the crime by numerous Alcohol Tax Unit Investigators. The nature of these interrogations presents the usual conflict in testimony between the accused on the one hand and the officers on the other.

The version of the defendants was that, deprived of food, they were confined in the bull pen of the United States Marshal's office, without beds or chairs, from two o'clock in the morning of August first until five o'clock that afternoon, when they
64 were transferred to the county jail where they were served cheese sandwiches. After a short surcease, they were returned to the Federal Building and interrogated until midnight before being taken back to the county jail.

Before noon next morning, they were again conducted to the Federal Building and examined at intervals until two o'clock of the following morning. They say that, within this period, they were aroused from bed in the county jail around ten P. M., retaken to the Federal Building and there, surrounded by Federal Revenue Officers, were abused, cursed, threatened, accused of lying, and promised lighter punishment should they tell the truth. An acquitted defendant, Barney McNabb, was struck on the head with a book, according to his testimony—not given, however, before the

jury. None of their friends, relatives, or counsel were present while the McNabbs were being questioned.

The Federal Officers sharply contradicted the testimony of the accused, asserted that the defendants were furnished sufficient food and drink; and denied that any promises, inducements, or threats were made, or that any intimidation, coercion, physical violence, or undue pressure was exercised. The officers asseverated that the self-incriminating statements of the defendants were voluntary.

The District Supervisor of the Alcohol Tax Unit, Bureau of Internal Revenue, who was in charge of the investigation, testified: "I told each of them (the five defendants) before they were questioned that we were Government Officers, what we were investigating, and advised them they did not have to make a statement, that they need not fear force and that any statement made by them would be used against them and that they need not answer any questions asked unless they desired to do so, and I asked each of them if he understood that. I talked to each of them individually and each of them said he so understood. I told them that if they did answer the questions to tell the truth, but that they had a right to refuse to answer if they wished. * * * I have never threatened or abused any defendant in my life and I have been in the law enforcement work fifteen years. * * * When I knew the truth I told the defendants what I knew. I never called them damn liars, but I did say that were lying to me."

(1) Before receiving in evidence any purported incriminating statements of the defendants which the Government sought to prove had been made to the officers, the trial judge ordered the jury to retire from the courtroom, and during the exclusion of the jury, he heard at length and in detail testimony of officers, defendants and other witnesses. This was in conformity with established proper practice. *Cohen v. United States*, 291 Fed. 368 (C. C. A. 7); *Mangum v. United States*, 289 Fed. 213 (C. C. A. 9); *Hale v. United States*, 25 Fed. (2d) 430 (C. C. A. 8); *Wilson v. United States*, 162 U. S. 613, 624.

Upon the conclusion of this hearing, the judge, for announced reasons, ruled that any statements made by the defendants "under the conditions as submitted to the court" were admissible in evidence. The trial to the jury proceeded and a number of Revenue Officers testified to admissions made by the defendants.

None of the defendants testified before the jury.

Assigning error, the appellants charge that the admissions or confessions were not free and voluntary, but were obtained by "duress, coercion, and hope of reward to the extent that the will and mind of the appellants were subjugated."

The assignment must be overruled. The record reveals no situation remotely comparable to the plight of the defendants depicted in *Chambers v. Florida*, 309 U. S. 227, or in *Brown v. Mississippi*, 297 U. S. 278. No circumstances calculated to inspire terror or coerce free will have been shown in the instant case.

A free, voluntary confession, made without compulsion or inducement of any sort, is admissible in evidence. Where the evidence conflicts as to whether the confession is voluntary, if the court decides that the confession is admissible, the jury should be instructed to reject the confession if upon the whole evidence they find that it was not voluntary. *Wilson v. United States*, 162 U. S. 612, 624.

In *Sparf v. United States*, 156 U. S. 51, 55, it was said that "confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises."

When both affirmation and denial of a voluntary confession are in evidence, the issue of truth must be decided by the jury. In instructing the jury, the district judge carefully guarded the rights of the defendants: "Before you can consider the confessions of the defendants, or any of them, you must find they were voluntarily made. You take into consideration the facts and circumstances before you on this subject, the way and manner by which said confessions and admissions were obtained, and if they were
66 warned that what they said might be used against them.

It is sufficient if a confession is voluntarily made after having been warned or advised, and made without the aid of counsel, and made to officers while in custody; but if the confessions or admissions were not of a free and voluntary nature, then you will entirely disregard such confessions or admissions. In passing upon these questions you will consider the age and experience, the station in life, and the physical condition of the defendants making such statements, whether they had friends or relatives or counsel present, whether the questioning was carried on in a reasonable manner or not, whether they were threatened, abused, or forced to do acts against their will. If you conclude from the proof that the confessions or admissions were not the free and voluntary acts of the defendant, then you will disregard them and not consider them at all in your deliberations. It is for you to determine what credit you will give to the confessions in an effort to arrive at the truth in the case."

(2) Error is assigned to the action of the district court in admitting the testimony of two Government witnesses, Jones and Larkin, whose names were omitted from the list of witnesses furnished defendants. The predicate of the assignment is noncompliance with the mandate of Section 1033 of the Revised Statutes.

Title 18, Section 562, U. S. C. A., which provides: "When any person is indicted of treason, a copy of the indictment, and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial."

This statute is mandatory. *Logan v. United States*, 14 U. S. 263, 304; *Wilson v. United States*, 104 F. (2d) 81 (C. C. A. 5); *Brown v. United States*, 63 F. (2d) 136 (D. C. App.).

In the *Logan* case, the Supreme Court said: (op. 304) "The words of the existing statute are too plain to be misunderstood. * * * The list of witnesses required to be delivered to the defendant is not a list of the witnesses on whose testimony the indictment has been found, or whose names are endorsed on the indictment; but it is a list of the witnesses to be produced on the trial for proving the indictment. The provision is not directory only, but mandatory to the government; and its purpose is to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defense. Being enacted for his benefit, he may doubtless waive it, if he pleases; but he has a right to insist upon it, and if he seasonably does so, the trial cannot lawfully proceed until the requirement has been complied with."

It was observed, further (307), that "the statute does not make a defendant's right to a list of the witnesses to be called against him depend upon the degree of the crime, of which upon trial he is ultimately convicted, but upon the degree of the crime for which he is indicted."

It is important to observe that the Supreme Court found it unnecessary "to express a definite opinion upon the question whether the omission to deliver the list of witnesses to the defendants would of itself require a reversal of their conviction and sentence for less than a capital offense, inasmuch as they are entitled to a new trial upon another ground." Appellants have presented no decision where a judgment of conviction has been reversed upon the basis of nonobservance by the Government of the statute which they invoke. The dicta in the *Logan* case does not preclude the view that the failure of the trial court to require compliance with the mandatory statute was harmless error.

In our judgment, the error was, in fact, harmless. The testimony of the two witnesses whose names did not appear on the list was merely cumulative on material matters. Both had testified before the Commissioner at the preliminary hearing. Both had

been sworn and had answered several questions before defendants' attorney challenged their right to testify. No element of unfair surprise has been shown and no prejudicial invasion of the rights of the defendants appear. The omission of the names of the two witnesses from a long list was obviously an unintentional, non-prejudicial error. Counsel for the defendants did not even suggest the entry of a mistrial order or request a continuance when their objection was overruled. Both in the trial court and here the attorneys for the defense have stood frankly on the technical applicability of the statute.

Section 269 of the Judicial Code, as amended, provides: "All United States Courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." U. S. C. A., Title 18, Sec. 391; R. S. Sec. 726; Mar. 3, 1911, c. 234, Sec. 269, 36 Stat. 1163; Feb. 26, 1919, c. 48, 40 Stat. 1181.

In a criminal case, this court, applying the statute quoted, held that conviction will be reversed only where it appears that there has been committed a plain and vital error indicating a miscarriage of justice in the result. *Westfall v. United States*, 2 F. (2d) 973 (C. C. A. 6). See also, *Stetson v. United States*, 257 Fed. 689, 693 (C. C. A. 6); *Dierkes v. United States*, 274 Fed. 275 (C. C. A. 6). In civil cases, our court has likewise held that if the record fairly indicates that the error was not prejudicial, a reversal is not necessary. *Mitchell v. Pittsburg, etc., R. Co.*, 13 F. (2d) 704, 705. In *Morton Butler Timber Co. v. United States*, 91 F. (2d) 884, 890, we said: "An error must be deemed harmless if upon examination of the entire record substantial prejudice to the defendant does not appear." The statute in terms applies to both criminal and civil cases.

Other United States Circuit Courts of Appeals have applied the harmless error statute (Section 269 of the Judicial Code) in upholding convictions in criminal cases, where on the whole record no prejudicial error appeared. *Bruno v. United States*, 67 F. (2d) 416, 421 (C. C. A. 9); *Johnson v. United States*, 59 F. (2d) 43, 46 (C. C. A. 9); *Lewis v. United States*, 38 F. (2d) 406, 410 (C. C. A. 9); *Haywood v. United States*, 268 Fed. 795, 798 (C. C. A. 7); *Claibourne v. United States*, 77 F. (2d) 682, 690 (C. C. A. 8); *Green v. United States*, 93 F. (2d) 537, 539 (C. C. A. 10).

Without reference to the statute, it has been held in still other circuits that a judgment of conviction in a criminal case should not be reversed for harmless error. *Martin v. United States*, 100 F. (2d) 490, 497 (C. C. A. 10); *Finn v. United States*, 251 Fed. 476, 483 (C. C. A. 2).

On the whole record, there appears no resultant prejudice to defendants from the omission of the names of two witnesses from the long list furnished the defendants by the Government in conformity with Section 1033 of the Revised Statutes (U. S. C. A., Title 18, Sec. 562.)

(3) Appellants assert that the district court erred in refusing to charge, at their request, that: "if the defendant or defendants though that the deceased Samuel Leeper was a hi-jacker or
69 robber, and that he was present in the McNabb Cemetery for the purpose of stealing or taking by force of arms the whiskey involved, then the owner or owners of such whiskey would have had the right to use such force as was necessary to prevent the taking of said whiskey, and if they used no more force than was necessary then they would not be guilty; but if more force than was necessary was used, then this would reduce the degree of homicide to manslaughter."

This requested instruction was properly refused. The defendants were not defending their "castle." The deadly shot was fired from ambush. In the circumstances, there could be drawn no reasonable inference that the killing was in the sudden heat of passion. Cooling time had intervened. The crime committed does not reduce to voluntary manslaughter.

Moreover, as Joel Prentiss Bishop has truly declared in his authorities *Treatise on Criminal Law* (Ninth Edition): "Life being superior to property, no one has the right to kill another in defense of the latter; yet by less extreme means, one may defend his own (Sec. 706). . . . A man may defend his property by any force necessary under the circumstances, such as assault and battery, short of taking the aggressor's life. But rather than slay him, he must yield and find his protection in the courts." (Sec. 875.)

(4) Appellants complain further that, at their request, the district court should have charged the jury that the defendants could not be convicted unless they knew or had reasonable grounds to believe that the murdered man was a government officer. They charge error also in the refusal of the court to direct a verdict of acquittal for the reason that the appellants "did not have notice or knowledge that the deceased was an officer connected with the Internal Revenue Department of the United States of America at the time the fatal shot was fired."

Refutation of this specious argument is found in the plain language of the statute: "Whoever shall kill, as defined in Sections 452 and 453¹ of this title any United States Marshal * * * any officer, employee, agent, or other person in the service of the customs or of the Internal Revenue * * * while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under Section 454² of this title." U. S. C. A., Title 18, Sec. 253, inclusive of amendment of June 13, 1940, c. 359, 54 Stat. 391.

To be amenable to punishment under this section of the Criminal Code of the United States, the killer need not know that he is killing an officer, agent or employee of the United States. The ingredient of the crime condemned is the unlawful killing of a human being in some manner defined in Sections 452 and 453.

Jurisdiction in the Federal Courts under Section 253 stems from the actuality that the person killed is a designated Federal Officer, engaged in the performance of his official duties. In the language of the statute quoted in excerpt, no exemption is expressly made of a killer who does not know that he is killing a Federal Officer of a class covered by the statute. Exemption may not be implied. The words and the intent of the statute are clear beyond the necessity for any canonical construction. The statute says, "whoever shall kill," not "whoever shall kill with knowledge that he is killing" a Federal Officer of an enumerated class, shall be punished.

Shay v. United States, 95 F. (2d) 890 (C. C. A. 10), cited by appellants, in no aspect gainsays our interpretation of the statute.

(5) Appellants insist that the evidence was insufficient, as a matter of law, to sustain a conviction of murder in the second degree and that it was the duty of the district court

¹Sec. 452. (Criminal Code, section 273.) Murder: first degree; second degree. Murder is the unlawful killing of a human being with malice aforethought, every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree. (R. S. Sec. 5339; Mar. 4, 1909, c. 321, Sec. 273, 35 Stat. 1143.) U. S. C. A., Title 18, Sec. 452.

²Sec. 453. (Criminal Code, section 274.) Manslaughter: voluntary; involuntary. Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary.—Upon a sudden quarrel or heat of passion.

Involuntary.—In the commission of any unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in any unlawful manner, or without due caution and circumspection. (R. S. Sec. 5341; Mar. 4, 1909, c. 321, 1143.) U. S. C. A., Title 18, Sec. 454.

³Sec. 454. (Criminal Code, section 275.) Punishment: murder; manslaughter. Every person guilty of murder in the first degree shall suffer death. Every person guilty of murder in the second degree shall be imprisoned not less than ten years and may be imprisoned for life. Every person guilty of voluntary manslaughter shall be imprisoned not more than ten years. Every person guilty of involuntary manslaughter shall be imprisoned not more than three years, or ~~not~~ not exceeding \$1,000, or both. (R. S. Secs. 5339, 5343; Mar. 4, 1909, c. 321, Sec. 275, 35 Stat. 1143.) U. S. C. A., Title 18, Sec. 454.

to direct the jury to return a verdict of not guilty of murder in the second degree.

In considering this insistence, a United States Circuit Court of Appeals must conform to the function prescribed by the Supreme Court that the examination of the record in a criminal case is "not for the purpose of weighing conflicting testimony but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict." *Abrams v. United States*, 250 U. S. 616, 619.

Or, as stated in *Burton v. United States*, 202 U. S. 344, 373: "It was for the jury to pass upon the facts; and as there was sufficient evidence to go to the jury, this court will not weigh the facts, and determine the guilt or innocence of the accused by the mere preponderance of evidence, but will limit its decision to questions of law."

In *Ryan v. United States*, 99 F. (2d) 864 (C. C. A. 8), it was held that on appeal from a judgment of conviction, the reviewing court, in passing on the question of sufficiency of evidence, is required to accept that view most favorable to the government, inasmuch as the jury has found the appellant guilty. Cf. *Knoble v. United States*, 9 F. (2d) 567 (C. C. A. 6).

Again, in *Pierce v. United States*, 252 U. S. 239, 252, the functions of judge and jury are plainly demarked: "There being substantial evidence in support of the charges, the court would have erred if it had peremptorily directed an acquittal upon any of the counts. The question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide."

There is direct evidence in the record that when the two informers arrived near the spot where the Revenue Officer was subsequently killed, the three appellants were there, with the two McNabbs who were acquitted. The informers were told that the whiskey would not be loaded at the barn as pre-arranged, and were directed to drive down a little road to the cemetery. Three of the McNabbs, Raymond, Benjamin, and Emul, placed themselves on the side of the informers' automobile and rode down to the cemetery gate, where the car was turned around. Raymond and Benjamin McNabb were assisting informer Davidson and Barney McNabb in carrying the whiskey from the cemetery to a location near the cemetery gate, when someone ran across the hill and shouted, "Don't load! Something funny!"

Informers Davidson then flashed his flashlight as a signal to the Revenue Officers. As the officers ran in, the two informers jumped into the automobile and drove away, stopping when over the hill a quarter or half mile away to meet Officer Jones, as planned.

A description of the action at the time of the killing has been given heretofore and will not be repeated.

Only the admissions and confessions of the defendants, as related by several Alcohol Tax Unit investigators on the witness stand before the jury remain to be summarized, to complete a survey of the substantial evidence upon which the jury convicted appellants.

The statements of Benjamin McNabb will be first considered. According to the testimony of the investigators who questioned him, Benjamin McNabb stated that when he left his home he was unarmed, that he crossed the Tennessee River and, in the late afternoon, before dark, arrived at the McNabb Settlement where he met three persons and was told that his liquor had been sold to two people. He objected on the ground that the persons named were "hi-jackers" and might "hi-jack" the liquor, but later withdrew his objection and agreed to the sale. He was with the party which met the informers' automobile, and his statement was in substantial conformity with the testimony of Officers Renick and Abrams and Informer Davidson as to the driving of the informers' automobile to the cemetery gate and the transportation of the liquor to that conveyance. While he was assisting in carrying liquor to the car, someone exclaimed, "Look! There comes the law!" He ran, and lost his black hat in his flight. The hat, identified by him, was found on the ground in the hog lot.

His statements varied as to whether he ran through the graveyard or away from it, but he admitted throwing a rock toward the officers who were pouring the liquor out of the cars. He said that he met Freeman and Raymond McNabb at a gate at the northeast corner of the cemetery. The gate near which the liquor had been cached was to the south. According to his statement, when he asked them what he should do, Freeman handed him a shotgun and a flashlight, and Raymond said, "Pour it on them." Raymond McNabb consistently denied this, and insisted that he told Benjamin not to shoot. Freeman denied meeting Benjamin and Raymond at the cemetery corner and handing the gun to the former.

Benjamin McNabb admitted firing the fatal shot, saying that he fired from a position in the rear of the graveyard fence. He denied firing the second shot and contended that he merely heard it as he ran down hill to Jim McNabb's house. At another time, however, he said that he did not hear the second shot until he arrived at the house. He stated that after he had fired, he gave the gun to Raymond and that Freeman gave him another shell to load into the shotgun. A shot

gun shell was found about twenty five yards north of the graveyard.

Benjamin McNabb, according to the testimony of the Assistant District Supervisor of the Alcohol Tax Unit, marked on a crude pencil-drawn map, introduced in evidence, the course of his various movements.

From the review which has been made, there was certainly ample evidence upon which the jury could properly convict the killer, Benjamin McNabb, of murder in the second degree.

The statements of Freeman and Raymond McNabb will be now considered. It should be commented that the District Judge was careful in his effort to avoid consideration by the jury of an admission or confession of one defendant as evidence against another. In the hearing of the jury, the witnesses were required to substitute "persons" for the names of individuals referred to by any suspect when making his voluntary statement, describing his own actions.

Furthermore, the jury were charged that "any confession or admission introduced in evidence is competent evidence only against the person making it, unless some other defendant was present and agreed that the statement was true. If any other defendant was present at the time and denied the statement made in the confession, then it cannot be considered as evidence against the defendant so denying it."

Inasmuch as Benjamin McNabb was the proven killer, the guilt or innocence of Freeman McNabb and Raymond McNabb of second degree murder turns upon whether they were aiders and abettors in the crime.

Section 332 of the United States Criminal Code provides: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." U. S. C. A., Title 18, Sec. 550.

According to the testimony of the investigators, Freeman McNabb admitted that he arranged for the sale and delivery of the illicit whiskey, that when he went up the road on the evening of the tragedy he carried a shotgun because he thought someone might try to get his whiskey . . . and he meant

74 to shoot anybody who tried to take his whiskey." He also admitted that he carried the flashlight which was subsequently found in the cemetery between the spot where the decedent Leeper was shot and the white oak tree, from near which Raymond said the shot was fired. Benjamin McNabb asserted that he had returned the flashlight to Freeman and that it was not in the former's possession while he was in the graveyard.

Freeman McNabb admitted that he was the person who shouted, "Here comes the law!" But he immediately changed his admission as to what he exclaimed to, "Look out! It is three men!" His statement substantiated the testimony of the Federal Officers as to occurrences prior to the shooting. He stated that he stayed behind the automobile, so that if "hi-jackers" did get after his whiskey he would keep them from getting away with it.

From the circumstances which have been related, from the fact that his flashlight was found in the cemetery, and from the fact that he carried a gun with admittedly malevolent intent, the jury could readily infer that Freeman McNabb aided and abetted the killing of Officer Leeper.

From the testimony of the investigators, it appears that Raymond McNabb admitted that he heard his twin brother, Freeman, shout, "Look out! Here comes the law!" and that he ran through the graveyard to Jim McNabb's house but returned later to the cemetery fence corner at the rear gate, where he met his brother and Benjamin McNabb, though he denied that he told the latter to "pour it on them." At another time, he said that he ran through the upper end of the graveyard, around to the rear cemetery gate, where he met the two. He did not at any time deny meeting his brother and Benjamin at the little cemetery gate before the shooting. He admitted that he was behind the graveyard and saw Benjamin McNabb fire the fatal shot. His first description was that Benjamin went to the center of the cemetery and from near a big tree fired two shots as rapidly as he could fire, re-load and fire again. He immediately changed this statement, however, and said that Benjamin fired only one shot from near the tree and that when the second shot was fired, he (Raymond) was running down hill.

The court carefully charged the jury that a person would not be guilty of murder simply because he was present when the murder was committed and where there was nothing to indicate that he had participated therein directly, or was aiding or abetting, counseling, commanding, or procuring the murder.

Upon his own description of his movements, the circumstantial evidence and the whole proof, Raymond McNabb who, after running away from the officers, met and stood in ambush nearby the killer when the fatal shot was fired, could, with reasonable justification, be found guilty of aiding and abetting second degree murder. The verdict of the jury should be upheld.

The judgment and sentence of the District Court, as to each of the three appellants, is affirmed.

Supreme Court of the United States

Order granting motion for leave to proceed in forma pauperis

June 8, 1942

On consideration of the motion for leave to proceed further herein in forma pauperis,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

Supreme Court of the United States

Order allowing certiorari

Filed June 8, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.